

**JUNE 20, 2012**  
**DECISION BRIEFING FOR THE ASSISTANT ADMINISTRATOR ON**  
**MAINE'S RIVER HERRING LAW (AKA ALEWIFE LAW)**

**Decision Briefing:** Obtain management concurrence that Maine's River Herring Law, which bans the migration of alewives and blueback herring on the St. Croix River, constitutes a new or revised water quality standard under CWA 303(c); and, seek direction as to how to respond to the legal complaints.

- EPA's response to CLF complaint is due August 6.
- Earthjustice/FOMB can file their complaint as early as July 13<sup>th</sup>.
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(b)(5)

**Maine Water Quality Standards and River Herring Law Background**

- The relevant provisions of Maine's Water Quality Standards (WQS) provide:

***Designated Use.*** In Maine, Class A waters must be "suitable...habitat for fish and other aquatic life," and, for such waters, "[t]he habitat must be characterized as natural." "Natural" means "living in, or as if in, a state of nature not measurably affected by human activity."

***Criteria.*** "[t]he aquatic life...of Class A waters shall be as naturally occurs." "As naturally occurs" means "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity."

- The River Herring Law (as amended on April 6, 2012) states, in part:

§ 6134. River herring passage; fishways on the St. Croix River

This section governs the passage of alewives on the Woodland Dam and the Grand Falls Dam located on the St. Croix River.

....

**2. Grand Falls Dam.** The commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that **prevents the passage of river herring**. [emphasis added]

Sec. 3. 12 MRSA §6001, sub-§37-B. River herring. "River herring" means the species *Alosa pseudoharengus*, commonly called alewife, and *Alosa aestivalis*, commonly called blueback herring.

- The River Herring Law prevents alewives from accessing 94% of their natural inland spawning habitat (some of which is designated Class A). Alewives are ecologically important for both inland and marine ecosystems.
- Maine's fishery and environmental officials do not support the dam closure.
  - The River Herring Law, together with other actions taken to close fish passage in the St. Croix River since 1991, have resulted in a decline in alewife population from 2.6 million returning alewives to 900 measured in 2002.
  - Shortly thereafter, Canada began trucking alewives around the Great Falls Dam and the alewife population rebounded to 12,000 in 2006.
- NOAA is considering a petition to list alewives along the eastern seaboard, including the St Croix River, as an endangered or threatened species. NOAA must decide whether to list the species by August 1, 2012.
- Neither the Maine legislature, the Maine Attorney General, nor the Maine Department of Environmental Protection consider the River Herring Law to be a WQS revision. The Maine Attorney General has argued (in separate federal litigation defending against Earthjustice/FOMB) that the 2008 Alewife Law is not a WQS revision, but rather "an effort to achieve a balance between particular competing fish populations, which is a classic state wildlife management prerogative."
- The St. Croix River is an international river, and Canada is interested in restoring alewives to the river. EPA, the Department of State, Fish and Wildlife Service, NOAA, and DOJ have discussed alewives and the relevance of the Boundary Waters Treaty.

(b)(5)

- The two federally recognized tribes in the St. Croix River watershed are united in opposition to the river herring blockage.

### Recommended Options

(b)(5)

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## Appendix A

### Legal Background

- In response to an inquiry, on November 8, 2010, a Region 1 ORC attorney sent an email to a member of the Friends of Merrymeeting Bay stating that EPA does not view the River Herring Law as a water quality standards revision and, therefore, EPA did not need to review and approve the regulation under the CWA.
- In July 2011, the Conservation Law Foundation (CLF) sent a 60-day notice of intent to sue EPA under the Clean Water Act, claiming that EPA has a mandatory duty to review Maine's statute under CWA section 303(c) because it is a de facto revision of Maine's WQS. Also in 2011, Friends of Merrymeeting Bay (FOMB, represented by Earthjustice) sued the State of Maine in federal district court arguing that the River Herring Law is a WQS revision that is preempted by the CWA. As a result of these developments, in late 2011, EPA sent an email to the parties in the FOMB v. State of Maine litigation stating that EPA had decided to take a fresh look at whether the River Herring Law constitutes a WQS revision.
- In March 2012 the district court in Maine issued a decision dismissing FOMB's complaint (b)(5) stating: "[t]he Alewife Law may well effect a change in water quality standards, and this revision may trigger EPA review of the Alewife Law.... The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review. In the event that EPA chooses not to review the River Herring Law, the Plaintiffs may sue the EPA under the citizen suit provision of the CWA."
- On May 14, 2012, FOMB/Earthjustice submitted a 60-day notice of intent to sue under the Clean Water Act. FOMB's 60-day waiting period ends on July 13, and they are expected to file a complaint against EPA shortly thereafter.
- On May 31, 2012, CLF filed a complaint against EPA, claiming that EPA has a mandatory duty to review Maine's statute under CWA section 303(c) because it is a de facto revision of Maine's WQS. The complaint has been served upon EPA. EPA has until August 6, 2012 to respond to the complaint.

Appendix B

**The River Herring Law as a WQS under CWA 303(c)**

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